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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation: *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155

Dear Secretary Dortch:

Peerless Network, Inc. ("Peerless") and West Telecom Services, LLC ("West") respectfully submit this letter to express their concerns with the Draft Order[1] in the above-referenced proceeding that proposes to amend the definition of "access stimulation." In particular, the Commission should decline to adopt the proposed traffic-ratio trigger under which a Competitive Local Exchange Carrier ("CLEC") would be considered engaged in access stimulation, despite not having a revenue sharing agreement, if the CLEC has an interstate terminating-to-originating traffic ratio of at least 6:1 in a calendar month ("6:1 Trigger"). As explained below, this 6:1 Trigger is flawed, ill-defined, not realistically implementable within the time frame envisioned, and would be unlawful if adopted.

A. The 6:1 Trigger is Flawed

First, the 6:1 Trigger is flawed, because it would ensnare CLECs that are not access stimulators. As a threshold matter, the record does not support applying the 6:1 Trigger nationwide to all LECs, because the 6:1 Trigger is designed to eliminate access arbitrage by access-stimulating LECs that subtend the networks of Centralized Equal Access ("CEA") providers. Rather than causing widespread unintended consequences by casting a wide net that applies the 6:1 Trigger on a nationwide basis, the rules adopted in this proceeding – including

[1] *See Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Report and Order and Modification of Section 214 Authorizations, FCC-CIRC 1909-02 (rel. Sept. 5, 2019) ("Draft Order").

any traffic-ratio trigger – should be narrowly targeted to apply only where the identified problems with access stimulation actually exist, which is within CEA networks.[2]

The proposed 6:1 Trigger is also overbroad in another respect. While the Draft Order holds that a smaller ratio was not adopted "to protect non-access-stimulating LECs from being misidentified,"[3] the 6:1 ratio is still entirely too small, because it will cause non-access stimulating LECs to be incorrectly identified as access stimulators. Currently, terminating-to-originating traffic ratios are increasing based on how services are provided and due to transitions in consumer demand. For instance, most traditional LECs provide "all-distance voice services"[4] to their end user customers and therefore, originating access records are unnecessary and may not be available to include in the 6:1 ratio. In addition, LECs that serve businesses with call centers that handle significant inbound traffic may have a 10:1 terminating-to-originating ratio.[5] Moreover, as NTCA recently indicated, terminating-to-originating ratios are increasing because of customer preferences to use other technology in making outbound long-distance calls, such as wireless, VoIP, other customized long-distance calling services, or direct handoffs to cloud-based or other third-party providers, without appearing as originating access traffic.[6] Because the evolving marketplace is changing how originating traffic is handled and routed, terminating-to-originating traffic ratios are increasing. In addition, NTCA has already identified a percentage of LECs that would trip the 6:1 Trigger or are on the cusp of doing so, despite not being access stimulators.[7] As a result, LECs that are not access stimulators would improperly be identified as access stimulators under the 6:1 Trigger, contrary to the Commission's intention to avoid such misidentifications.

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[2] *See* Comments of Peerless Network, Inc. and Affinity Network, Inc. d/b/a ANI Networks, WC Docket No. 18-155, at 10 (filed July 20, 2018) ("The Commission should narrowly tailor its Proposed Rule so that it only applies to LECs that subtend CEA networks. In short, no justification exists for the Commission to apply its Proposed Rule to LECs outside of CEA network." And further explaining that "Narrowing of the Commission's Proposed Rule to LECs within CEA networks is also necessary to ensure that IXCs do not exploit the rule as a means to justify 'self-help' outside of CEA networks.").

[3] Draft Order, ¶ 45.

[4] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, Lifeline and Link Up Reform and Modernization, Connect America Fund*, WC Docket Nos. 14-192, 11-42, 10-90, Memorandum Opinion and Order, 31 FCC Rcd 6157, ¶ 49 (2015) (recognizing the "the trend toward all-distance voice services") (subsequent history omitted).

[5] *See* Letter from Jon D. Jones, Data Tech, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (filed Sep. 17, 2019) ("Data Tech Sept. 17, 2019 *Ex Parte")*.

[6] Letter from Michael R. Romano, NTCA–The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155, at 3 (filed Sep. 11. 2019) ("NTCA Sep. 11, 2019 *Ex Parte*").

[7] NTCA Sep. 11, 2019 *Ex Parte* at 2.

B. The 6:1 Trigger is Ill-Defined

Second, the 6:1 Trigger is ill-defined and subject to multiple interpretations.[8] For instance, as written in the Draft Order, an IXC with just 6 minutes of terminating interstate switched access traffic *to* and 1 minute of originating interstate switched access traffic *from* a small CLEC could conceivably argue that the CLEC (a) tripped the 6:1 Trigger for that innocuous amount of traffic and (b) must comply with tariffing obligations and bear financial responsibility for the tariffed tandem switching and transport charges associated with the delivery of traffic for *all* IXCs to the LEC's end office. This result reveals the fundamental and significant design flaws with the 6:1 Trigger. Consequently, the absence of a revenue sharing component would astonishingly impose strict liability on any CLECs—even those with incredibly small amounts of traffic—that meet the trigger without any specific intent or effort to stimulate access traffic, and thereby penalize them for simply handling legitimate traffic.

C. Implementation of the 6:1 Trigger Is Not Realistically Workable

Third, despite the fact that many LECs—small and large—that are not access stimulators may conceivably trip the trigger due to changing or outlier traffic patterns, the timeline for such LECs (especially long-standing legacy LECs that still use TDM-based tandem switches and older billing systems) to address operational issues (e.g., adjusting billing systems to implement revisions prompted by the nationwide 6:1 Trigger, revising tariffs, and accommodating rerouted traffic, among other things) is simply not realistically workable. As a preliminary matter, adoption of the 6:1 Trigger would cause tremendous and widespread confusion in the industry in determining which intermediate providers are to be paid by which LEC. This transition in both charges and payment for tandem switching and transport services would likely, in turn, result in tremendous shifts in the routing of a LEC's terminating traffic. For example, LECs that trip the 6:1 Trigger may want to reroute their terminating traffic through different intermediate providers; however, for LECs that are currently homed to an ILEC's access tandem, rerouting traffic takes much more than 3 months, which is approximately when the Commission's new rules, if adopted, would go into effect.

Moreover, even if intermediate providers were to shift billing to LECs (rather than IXCs) as a result of the 6:1 Trigger being tripped, significant reprograming of billing systems would need to performed before that could occur. Modifying these billing systems (especially for those LECs that serve as intermediate providers that utilize older billing systems which are not easily reprogrammed) cannot be done overnight, if at all, because they were designed to assess CABs invoices to IXCs and, as a result, substantial (and possibly expensive) updates to these systems would need to be made so that invoices are redirected to LECs.[9] Additionally, intermediate providers would need to significantly revise their access tariffs to allow for billing CABs

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[8] *See* Data Tech Sept. 17, 2019 *Ex Parte* at 2 (explaining that the 6:1 Trigger definition is "too vague" and subject to "multiple interpretations").

[9] Data Tech Sept. 17, 2019 *Ex Parte* at 2 (explaining that implementing the 6:1 Trigger would require "massive" billing system changes that would be "burdensome and possibly expensive for both LECs and IXCs to deal with").

invoices to LECs rather than IXCs. These are the actual consequences (which appear unintended by the Commission) that LECs and intermediate providers would face, even though they are not access stimulators. In short, addressing these issues within the 3 or so months the Commission is proposing before the 6:1 Trigger goes into effect on a nationwide basis is simply unrealistic and unworkable. Carriers need much more time than this to implement the drastic changes to tariffs, billing systems, traffic rerouting, among other things, that would follow in the wake of any Commission adoption of the 6:1 Trigger on a nationwide basis.

D. Adoption of the 6:1 Trigger at This Time Would be Unlawful

Fourth, any Commission adoption of the 6:1 Trigger at this time would be patently unlawful on both procedural grounds and on the merits. Indeed, the 6:1 Trigger cannot be adopted because, under the Administrative Procedure Act ("APA"), appropriate notice has not been afforded to interested parties. As the Draft Order makes clear, the 6:1 Trigger was selectively plucked from Inteliquent's three-prong conjunctive April 2019 proposal,[10] with the last two of the prongs being discarded by the Draft Order because they were deemed to "unduly complicate the definition."[11] The Commission never solicited comment from interested parties on either (a) adopting Inteliquent's proposal or (b) just the 6:1 traffic ratio, as a new rule. Consequently, any Commission adoption of the 6:1 Trigger at this time would violate the APA. As the Eighth Circuit recently explained when it vacated a portion of a Commission order, "[t]he APA requires interested parties wishing to play a role in the rulemaking process to comment on the *agency's* proposals, not on other interested parties' proposals."[12] This is precisely the case here and as a result, parties have been "prejudiced because any chance to make their case [on the 6:1 Trigger] did not come from the FCC's notice."[13]

Nor would the Commission's release of its Draft Order three weeks before its potential adoption on September 26, 2019 cure this prejudice. The Eighth Circuit recently addressed and rejected this very argument, holding that "providing a few weeks to review the [draft] Order [before adoption by the Commission at its open meeting]" "does not cure the harm from inadequate notice."[14] The Eighth Circuit emphasized that "[t]he APA's procedural rules are designed to allow parties the opportunity for informed criticism and comments,…and creating any exceptions to the procedural requirements would allow agencies to significantly alter the

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[10] Draft Order, ¶ 45 & n.126 (stating that "Inteliquent proposes defining access stimulation as a 6:1 terminating-to-originating traffic ratio in one month, more than 10 miles of transport billed between the tandem and serving end office, and a terminating end office having at least one million interstate terminating minutes-of-use in a calendar month" and citing "Inteliquent Apr. 18, 2019 *Ex Parte* Attach. at 22").

[11] Draft Order, ¶ 45.

[12] *Citizens Telecommunications Company of Minnesota, LLC et al. v. FCC*, 901 F.3d 991, at 1006 (8th Cir. 2018) ("*Citizens*").

[13] *Id.* at 1006.

[14] *Id.* at 1005-06.

course of a proceeding without authorization."[15] By no means have interested parties been given the opportunity to submit informed criticism and comments on the 6:1 Trigger and therefore, any attempt to adopt the 6:1 Trigger at this time would violate the APA.

Moreover, apart from the Commission's "inadequate notice of this issue,"[16] adoption of the 6:1 Trigger would be blatantly arbitrary and capricious. As a preliminary matter, adoption of the 6:1 Trigger would be arbitrary because the Commission failed to consider "relevant factors and alternatives after full ventilation of the issues" in arriving at its choice.[17] The record in this proceeding reveals no such "ventilation of issues" and "alternatives" by the Commission. In fact, alternatives to the 6:1 Trigger, such as a cap on mileage, were not given appropriate consideration.[18] Relatedly, Peerless and West already cap their transport mileage to 10 or less miles, so such an approach seems far more feasible than an ill-defined 6:1 Trigger that will likely prompt far more disputes and market disruptions (along with other unintended consequences) than it resolves. Nor does the Draft Order address the fact that RBOCs, such as AT&T and Verizon, stand to benefit tremendously by the 6:1 Trigger unlike competitive providers.[19] Further, contrary to the Draft Order's holding, the 6:1 Trigger would actually "penalize[e] innocent LECs" that are not access stimulators.[20]

And, contrary to the Draft Order's holding, the record demonstrates that parties have offered "data or examples to demonstrate that there are LECs not involved in access stimulation that have traffic imbalances so extreme as to meet or even come close to the 6:1 ratio."[21] Nor is

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[15] *Id.* at 1005 (internal citation omitted).

[16] *Id.* at 1006.

[17] *Mount Evans Co. v. Madigan*, 14 F.3d 1444, at 1453 (10th Cir. 1994) (holding that review of agency decision for capriciousness or abuse of discretion is narrow and agency need only demonstrate that "it considered relevant factors and alternatives after full ventilation of issues and that choice it made was reasonable based on that consideration.").

[18] *See* Letter from Matthew DelNero and Thomas Parisi, Counsel to Inteliquent, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-155, Attach. at 22 (filed Apr. 18, 2019).

[19] Indeed, RBOCs may get a windfall from the 6:1 Trigger. For example, to the extent they assess terminating tandem and transport switched access charges to IXCs, they are largely assessing those charges to their IXC affiliates, which are the top long-distance providers in the nation. As a result, if a LEC that subtends an RBOC's tandem is not affiliated with an RBOC but trips the 6:1 Trigger, the RBOC will be able to stop assessing its tandem and transport switched access charges to its IXC affiliates and then, turn around and bill such charges to the non-affiliated LEC. The net result is that the RBOCs are still made whole, while their IXC affiliates benefit at the cost of the competitive industry. That said, the RBOCs of course have no objections to the 6:1 Trigger because their companies overall stand to benefit from it.

[20] Draft Order, ¶ 46.

[21] *Id.*; *see* NTCA Sep. 11, 2019 *Ex Parte* at 2.

there substantial or reliable record evidence needed to adopt the 6:1 Trigger.[22] Rather, the record demonstrates that the 6:1 Trigger was arbitrarily and capriciously contrived by simply doubling the 3:1 ratio under the existing access stimulation definition. Absolutely no substantive evidentiary support exists to show that the 6:1 Trigger is appropriate and would not misidentify non-access-stimulating LECs as access stimulators.

For these reasons, 6:1 Trigger is fundamentally flawed and any adoption of it at this time would be unlawful.

If you have any questions or would like additional information about the issues discussed in this letter, please let me know.

Respectfully,

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[22] *Digilab, Inc. v. Secretary of Labor*, 357 F. Supp. 941(D.C. Mass. 1973), *remanded on other grounds*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974); *First Girl, Inc. v. Reg'l Manpower Adm'r of U. S. Dep't of Labor*, 499 F.2d 122, 124 (7th Cir. 1974) (explaining that "[a] finding based upon no reliable evidence whatever is a clear error of judgment and an abuse of discretion."); *United States v. Pacheco*, 884 F.3d 1031, 1047 (10th Cir. 2018) (explaining that "[a]n abuse of discretion is defined … as judicial action which is arbitrary, capricious, or whimsical."); *Citizens*, at 1000 (a decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency").

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